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SHARSWOOD'S PROFESSIONAL ETHICS.[1]

THE author is well qualified to treat the subject, which he discusses, as he brings to his work, not only great abilities and learning, but a long and extensive practical experience, both at the bar and on the bench. He has felt the perplexities and embarrassments of the lawyer, his temptations and his duties. He has experienced the facility of resisting all inducements to do wrong, under the protection of high principles and the love of right, and he has seen how easy it is, without that protection, to fall into the meshes of the unscrupulous, and become the victims of the depraved. He can tell of the rewards awaiting all who industriously pursue their high calling, and steadily practice it under the guidance of truth and integrity; and he can point out the certain ignominy of those who reject such control, and their almost certain failure to obtain any compensation for their degradation.

The office of Presiding Judge of the District Court, for our great

[1] A Compend of Lectures on the Aims and Duties of the Profession of the Law, delivered before the Law Class of the University of Pennsylvania; by Geo. Sharswood, Professor of the Institutes of Law. Philadelphia: T. & J. W. Johnson.

city, in which so large a mass of diversified business is constantly transacted, and where, in almost every possible manner, each member of the bar must present himself, affords the author the opportunity, not only of accurately testing the learning and ability of each member of the bar, but also of perceiving every failure in truth or rectitude, and usually the motive of that failure and its character. He can tell whether it arises from the utter worthlessness of the man's general nature, or from some mental or physical inferiority, and whether it is habitual or otherwise; if the latter, how it has occurred, whether it is a first offence, and with what likelihood its repetition may be expected.

Emanating from an experienced lawyer and judge, the book will prove an incentive to the student and young practitioner, to choose and adhere to the side of morality and virtue, and we hope its warning voice will save many from falling into evil habits. As the maxim, "*ce n'est que le premier pas qui coute,*" is so correct, that we find few who once commit an offence refrain from its repetition, it is of the utmost importance to warn those who will be exposed to temptation, of its existence, and its strength, and to exhibit to them the bitter consequences of yielding, and the enjoyment and advantages of resistance.

But another object will be effected. Right and wrong are generally words of relative meaning; any one using them has before him some standard by which he tries an action, and he pronounces it to be right or wrong as it may come up to or fall short of his measure. Every community, in like manner, have a more or less definite rule, generally adopted and approved, so that no matter how a man may test his own heart or his own conduct, he will not apply to the act of any fellow member a higher test than that which is commonly regarded as the standard. Now ordinarily it will be found, that almost all the members of any body will conceive it unnecessary to guide their own conduct by any other rule of right than that which has been and is approved by their fellows. Still, when any one of weight of character demonstrates the defect of this common scale of conduct, and supports his objections by sound reason, he is nearly sure to effect an

amendment of the evil. Mankind have a beau ideal of excellence, and virtue is loved by most men for its own sake; a teacher of a high morality has, therefore, less difficulty than might at first be supposed in effecting, at least, an external change in those whom he addresses.

Judge Sharswood's book probably places higher the ordinary standard of a lawyer's rectitude—and it cannot be thought that his labor will be in vain. If a doubt can be excited as to the propriety or impropriety of any course, no worthy man will hesitate to decide the case on the safe side, and to act more rigidly than might be *necessary*—thus, in a short time, all who are anxious to do right, will establish for themselves a stricter rule of conduct which, being settled, will speedily by general consent be imposed upon all the community.

There is still another manner in which Judge Sharswood will do good. Very many persons, not lawyers, conceive that the practice of the law necessarily infringes on the rules of morality; and this, notwithstanding, the same persons are compelled to admit that almost every distinguished lawyer, whom they know personally or by reputation, is an eminently honorable and upright man—fearing God and loving his neighbor. Now, the exhibition of the facts in regard to the practice of the law completely removes the supposed foundation for this vulgar prejudice.

"That lawyers are as often the ministers of injustice as of justice is the common accusation in the mouth of gainsayers against the profession.

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"It may be answered in general:—

"Every case is to be decided by the tribunal before which it is brought for adjudication upon the evidence, and upon the principles of law applicable to the facts as they appear upon the evidence. No court or jury are invested with any arbitrary discretion to determine a cause according to their mere notions of justice. Such a discretion vested in any body of men would constitute the most appalling of despotisms. Law, and justice according to law—this is the only secure principle upon which the controversies of men can

be decided. It is better on the whole that a few particular cases of hardship and injustice, arising from defect of evidence or the unbending character of some strict rule of law, should be endured, than that general insecurity should pervade the community from the arbitrary discretion of the judge. It is this which has blighted the countries of the East as much as cruel laws or despotic executives.

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"Now the lawyer is not merely the agent of the party; he is an officer of the court. The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of his judges, which can legitimately bear upon that question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor. The court or jury ought certainly to hear and weigh both sides; and the office of the counsel is to assist them by doing that, which the client in person, from want of learning, experience, and address, is unable to do in a proper manner. The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the function of both judge and jury.

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"Much interest was excited some years ago in England, by the circumstances attending the defence of Courvoisier, indicted for the murder of Lord William Russell. The crime was one of great atrocity. It came out after his conviction, that during the trial he had confessed his guilt to his counsel, of whom the eminent barrister, Charles Phillips, Esq., was one. Mr. Phillips was accused of having endeavored, notwithstanding this confession, to fasten suspicion on the other servants in the house, to induce the belief that the police had conspired with them to manufacture evidence against the prisoner, and to impress the jury with his own personal belief in the innocence of his client. How far these accusations were just in

point of fact was the subject of lively discussion in the newspapers and periodicals of the time.[1]

"On Tuesday night, May 5th, 1840, Lord William Russell, infirm, deaf, and aged, being in his seventy-third year, was murdered in his bed. He was a widower, living at No. 14 Norfolk street, Park Lane, London, a small house, occupied by only himself and three servants,—Courvoisier, a young Swiss valet—and two women, a cook and housemaid. The evidence was of a character to show very clearly, that the crime had been committed by some one in the house; but, Courvoisier's behavour throughout had been that of an innocent man. Two examinations of his trunks, by the officers of the police, showed nothing suspicious; rewards having been offered by the government and family of the deceased, for the detection of the criminal, a third examination was made of Courvoisier's box, which resulted in the discovery of a pair of white cotton gloves, two pocket hankerchiefs, and a shirt-front, stained with blood. The prisoner's counsel went to the trial, with a full persuasion of his innocence, and conducted the cross-examination closely and zealously, especially of Sarah Mancer, one of the female domestics, with a view of showing that there was as much probability, that the witness or the other domestic, was the criminal, as the prisoner; and that the police, incited by the hopes of the large rewards offered, had conspired to fasten the suspicion unjustly on him. At the close of the first day's proceedings, the prosecutors were placed unexpectedly in possession of a new and important item of evidence; the discovery of the plate of the deceased, which was missed, and that it had been left by the prisoner at the place where it was found, about a week, perhaps only a very few days before the committing of the murder. The parcel contained silver spoons, forks, a pair of gold auricles, all unquestionably the property of the unfortunate nobleman; and the only question remaining was, whether Courvoisier was the per-

[1] Law Magazine, February, 1850, May, 1854. Law Review, February, 1850. Several articles on the subject, taken from the English press, are to be found in Littell's Living Age, vol. 24, pp. 179, 230, 306. I have added, in an appendix, Mr. Phillips's vindication of himself from these charges, in his correspondence with his friend Mr. Warren, preceded by a brief statement of the case.

son who had so left it. If he were, it would of course, grievously for him, increase the *probabilities*, that it must have been he, who subsequently committed the murder, and with the object of plunder. On the ensuing morning, the person who had made this discovery (Mrs. Piolaine, the wife of a Frenchman, who kept a place of entertainment, called L'Hotel de Dieppe, in Leicester Place, Leicester Square), was shown a number of prisoners in the prison-yard, one of whom was Courvoisier, whom she instantly recognized as the person who had left the plate with her, and also had formerly lived in her employ. Courvoisier also suddenly recognized her, and with dismay. The immediate effect of his panic was the confession of his guilt to his counsel at the bar of the court, a few minutes afterwards, coupled with his desire, nevertheless, to be defended to the utmost. His probable object was simply to prepare his counsel against the forthcoming evidence. The prisoner was convicted, and afterwards confessed his crime. Mr. Phillips's conduct of the defence was criticzied at the time in the columns of the Examiner, but he suffered it to pass in silence. In 1849, that periodical renewed the accusation originally made, upon which the following correspondence appeared in the London Times of Nov. 20th, 1849.

TO THE EDITOR OF THE "TIMES."

"SIR,—I shall esteem it a great favor if you will allow the accompanying documents to appear in the '"Times."' Its universal circulation affords me an opportunity of annihilating a calumny recently revived, which has for nine years harassed my friends far more than myself.

"I am, &c.,

"CHARLES PHILLIPS.

"39 *Gordon Square.*

"*Inner Temple, Nov.* 14, 1849.

"My DEAR PHILLIPS,—It was with pain that I heard yesterday of an accusation having been revived against you in the 'Examiner' newspaper, respecting alleged dishonorable and most unconscientious conduct on your part, when defending Courvoisier against the charge

of having murdered Lord William Russell. Considering that you fill a responsible judicial office, and have to leave behind you a name unsullied by any blot or stain, I think you ought to lose no time in offering, as I believe you can truly do, a public and peremptory contradiction to the allegations in question. The mere circumstance of your having been twice promoted to judicial office by two lord chancellors, Lord Lyndhurst and Lord Brougham, since the circulation of the reports to which I am alluding, and after those reports had been called to the attention of at least one of those noble and learned lords, is sufficient evidence of the groundlessness of such reports.

"Some time ago I was dining with Lord Denman, when I mentioned to him the report in question. His lordship immediately stated that he had inquired into the matter, and found the charge to be utterly unfounded; that he had spoken on the subject to Mr. Baron Parke, who had sat on the bench beside Chief Justice Tindal, who tried Courvoisier, and that Baron Parke told him he had, for reasons of his own, most carefully watched every word that you uttered, and assured Lord Denman that your address was perfectly unexceptionable, and that you made no such statements as were subsequently attributed to you.

"Lord Denman told me that I was at liberty to mention this fact to any one; and expressed in noble and generous terms his concern at the existence of such serious and unfounded imputations upon your character and honor.

"Both Lord Denman and Baron Parke are men of as nice a sense of honor and as high a degree of conscientiousness as it is possible to conceive; and I think the testimony of two such distinguished judges ought to be publicly known, to extinguish every kind of suspicion on the subject.

"I write this letter to you spontaneously, and, hoping that you will forgive the earnestness with which I entreat you to act upon my suggestion, believe me, ever yours sincerely,

"SAMUEL WARREN.

"*Mr. Commissioner Phillips.*"

We should be glad if the limits of this article would permit us to add Mr. Phillips' own noble and indignant refutation of the libel on him, and we thank Judge Sharswood for having spread all the facts of the case before the American public; for we must frankly admit, that although we learned at the time of the occurrence the libellous accusation against Mr. Phillips, we had neither seen nor heard of his refutation of it. The case attracted attention all over the world, from the union of the illustrious character of the murdered man and the atrocity of the assassination. A report or notice of the case thus became a safe and easy vehicle for the wide dissemination of a libel upon Mr. Phillips, the distinguished counsel who conducted the defence of the murderer. We felt, in common, it is to be presumed, with other members of the bar, that Mr. Phillips' alleged conduct was indefensible, and that the character of the profession was degraded by it. The appendix to the work under review shows how completely unfounded and malignant this libel was; and we rejoice in aiding the circulation of its refutation.

Judge Sharswood examines in great detail, and illustrates with much learning the subject of professional compensation. As generally in this country the two offices of an attorney, and barrister, or counsellor at law, are united in the same person, we need only refer to the compensation of the latter. In England, as in ancient Rome, the advocate has no legal right to demand his fee—it is a voluntary payment, almost always freely given, and in proportion to the merit and services of the counsel. This was formerly the rule in Pennsylvania—but the Supreme Court have unhappily established a different doctrine. It has been an unfortunate change for the public. Many clients have in consequence been oppressed by exorbitant charges, and it has operated injuriously to the tone and character of the profession. A lawyer's services cannot be appraised like a lot of ground or a bale of merchandise. The latter have precisely ascertainable prices. The relative quality of the article can be definitely determined; but how shall the value of the services of counsel be measured? They depend upon various indefinite elements—such as the amount of time and labor bestowed on the business—the importance or value of it—the ability of the client to pay

—and last, but the most material of all—the value of the time and labor given by the counsel himself—if it must be put into mercantile language, "what other people will pay for it." Any lawyer, we think, will say, that in his experience, in almost every case where this matter has been brought into discussion, wrong has been done to the client. Few able, not to say distinguished advocates, will allow the value of their services to be passed upon as a question of fact by a jury. Should their charges be disputed, they will at once waive them—while on the other hand, those entitled to little or no consideration will claim, and generally under the rules of evidence, can compel such a payment as could only be awarded under the most favorable circumstances to the most distinguished. Specious arguments are certainly adduced against this view of the subject.

"The question really is, what is best for the people at large,—what will be most likely to secure them a high-minded, honorable bar? It is all-important that the profession should have and deserve that character. A horde of pettifogging, barratrous, custom-seeking, money-making lawyers, is one of the greatest curses with which any State or community can be visited. What more likely to bring about such a result than a decision, which strips the bar of its character as a learned profession, on the principle avowed by one court, that it is now a calling as much as any mechanical art,—or by another, in effect, that the order of things is in the present condition of society reversed, and clients are really the *patrons* of their attorneys. * * * * * * * *

"Every judge, who has ever tried a case between attorney and client, has felt the delicacy and difficulty of saying what is the measure of just compensation. It is to be graduated, according to a high legal authority, with a proper reference to the nature of the business performed by the counsel for the client, and his standing in his profession for learning and skill; whereby the value of his services is enhanced to his client.[1] Is then the stand-

[1] Vilas *v.* Downer, 21 Vermont, 419. Responsibility in a confidential employment is a legitimate subject of compensation, and in proportion to the magnitude of the interests committed to the agent. Kentucky Bank *vs.* Combs, 7 Barr, 543.

ing and character of the counsel in his profession for learning and skill to be a question of fact to be determined by the jury in every case in which a lawyer sues his client? How determined, if necessary to the decision of the question? Not surely by the crude opinions of the jurors; but by testimony of members of the same profession on the subject. This never is done; it would be a very difficult as well as delicate question for a lawyer to pronounce upon the standing of a professional brother. The most that can be done, is to call gentlemen to say what they would have considered reasonsonable for such services, had they been performed by themselves. Some may testify up to a very high point, from an excusable, though foolish vanity; others to a very low one, from the despicable desire of attracting custom to a cheap shop.[1] I have never seen such a cause tried without feeling that the bar had received by it an impulse downwards in the eyes of bystanders and the community. The case is thrown into the jury box, to be decided at hap-hazard, according as the twelve men may chance to think or feel.

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"But it appears to me, that it must be an extraordinary—a very peculiar case—that will justify an attorney in resorting to legal proceedings, to enforce the payment of fees. It is better that he should be a loser, than have a public contest upon the subject with a client. The enlightened bar of Paris, have justly considered the character of their order involved in such proceedings; and although by the law of France, an advocate may recover for his fees by suit, yet they regard it as dishonorable, and those who should attempt to do it, would be immediately stricken from the roll of attorneys."

The notice of this book has already occupied so much of our space, that we must pass over Judge Sharswood's able remarks on the debasing effects of contingent fees, or "an agreement to receive a certain part or proportion of the sum, or subject-matter, in the event of a recovery, and nothing otherwise," pp. 85, 86.

The appearance of this work we trust will be the commencement of

[1] That evidence of usage is admissible to show what is the rule of compensation for similar services to those sued for, see Vilas *vs.* Downer, 21 Vermont, 424; Badfish *vs.* Fox, 23 Maine, 94.

a new era in the history of our bar—in bringing prominently before its members the subject of their personal deportment and conduct as professional men; and we trust, that it will lead to the adoption of a higher standard of morality for themselves, and of greater politeness and deference for each other and for the bench; which latter will be reciprocated by the judges. If our aim is raised, our range will be higher. Let the leading members of the bar demand of the others an elevated moral tone in all their acts, and the requisition must be complied with. Truth is the basis of all virtue—but more emphatically of legal morality.

"Truth in all its simplicity—truth to the court, client, and adversary—should be indeed your polar star. I have observed the influence of only slight deviations from truth upon professional character. A man may as well be detected in a great, as a little lie. A single discovery among professional brethren of a failure of truthfulness, makes a man the object of distrust, subjects him to constant mortification, and soon this want of confidence extends itself beyond the bar to those who employ the bar. That lawyer's case is truly pitiable, upon the escutcheon of whose honesty or truth rests the slightest tarnish.

"Let it be remembered and treasured in the heart of every student, that no man can ever be a truly great lawyer, who is not, in every sense of the word, a good man. A lawyer, without the most sterling integrity, may shine for awhile with meteoric splendor; but, depend upon it, his light will soon go out in blackness of darkness. It is not in every man's power to rise to eminence, by distinguished abilities. It is in every man's power, with few exceptions, to attain respectability, competence, and usefulness. The temptations which beset a young man in the outset of his professional life, especially if he is in absolute dependence upon business for his subsistence, are very great. The strictest principles of integrity and honor are his only safety. Let him begin by swerving from truth or fairness, in small particulars, he will find his character gone—whispered away, before he knows it. * * * * *

"The covert, indirect, and insidious way of doing anything, is always the wrong way. It gradually hardens the moral faculties, renders obtuse the perception of right and wrong in human actions,

weighs everything in the balances of worldly policy, and ends most generally, in the practical adoption of the vile maxim, 'that the end sanctifies the means.' If it be true, as he has said, who, more than any mere man, before or since his day, understood the depths of human character, that one even may,

> 'By telling of it,
> Make such a sinner of his memory;
> To credit his own lie:'—

be careful never to speak or act, without regard to the *morale* of your words or actions. The habit may and will grow to be a second nature. * * * * * * *

"There is no class of men among whom moral delinquency is more marked and disgraceful than among lawyers. Among merchants, so many honest men become involved through misfortune, that the rogue may hope to take shelter in the crowd, and be screened from observation. Not so the lawyer. If he continues to seek business, he must find his employment in lower and still lower grades; and will soon come to verify and illustrate the remark of Lord Bolingbroke, that 'the profession of the law, in its nature the noblest and most beneficial to mankind, is in its abuse and abasement, the most sordid and pernicious.' "

JUDGMENTS OF OTHER STATES.

The following notice of some recent cases is offered as a supplement to Judge Hare's valuable note to *Mills* vs. *Duryee* and *McElmoyle* vs. *Cohen*, in the second volume of the American Lead-in Cases, p. 774.

The difficulty anticipated by Mr. Justice Johnson, in his dissenting opinion, in the case of *Mills* vs. *Duryee*, 7 Cranch, 481, has lately been presented to the Supreme Court of the United States, and received a solution in accordance with his views.

In *D'Arcy* vs. *Ketchum*, 11 Howard, U. S. R., 165 (decided in 1850), it was held that a judgment against joint debtors, rendered